Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MARYLAND,

Petitioner,

v.

DERRICK WENDELL SIMMONS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A POST-ARREST CONFESSION BY A NON-TESTIFYING ACCOMPLICE INTRODUCED INTO EVIDENCE AS A DECLARATION AGAINST INTEREST BEARS SUFFICIENT INDICIA OF RELIABILITY TO BE ADMISSIBLE UNDER THE CONFRONTATION CLAUSE?

2. WHETHER, IN ASSESSING THE TRUSTWORTHINESS OF SUCH STATEMENTS, ONLY THE CIRCUMSTANCES SURROUNDING THE STATEMENT CAN BE CONSIDERED?

PARTIES

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STATE OF MARYLAND,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Simmons v. State*, 333 Md. 547, 636 A.2d 463 (1994), reversing Respondent's convictions, is reproduced in Appendix A. (1a-19a).

The mandate by the Court of Appeals of Maryland denying the State's motion for reconsideration, which was issued March 4, 1994, is reproduced in Appendix B. (20a-21a).

The portion of the trial transcript containing the ruling of the Circuit Court for Prince George's County, Maryland, permitting introduction of the statement of Marquette Coley is reproduced in Appendix C. (22a-30a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on January 28, 1994. That court issued an order denying the Petitioner's motion for reconsideration on March 4, 1994. This petition is filed within ninety days of that order, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

STATEMENT OF THE CASE

Following a jury trial, Derrick Wendell Simmons was convicted of robbery with a deadly weapon, use of a handgun in commission of a felony, robbery, and burglary, in the Circuit Court for Prince George's County, Maryland. He was sentenced on March 29, 1993, to a period of 20 years incarceration for the robbery with a deadly weapon, with all but nine years suspended. Upon release, the trial court ordered that he serve five years of probation. Identical and concurrent sentences were imposed for the convictions

for use of a handgun in commission of a felony and for burglary. The trial court merged the conviction for robbery.

Notice of appeal to the Court of Special Appeals of Maryland was filed on April 22, 1993. After Simmons's brief was filed in that court, but before a decision in that court, the Court of Appeals of Maryland, on November 2, 1993, issued a writ of certiorari.

The Court of Appeals of Maryland, in a published decision issued January 28, 1994, reversed Simmons's convictions. The State filed a motion for reconsideration, based on this Court's granting of a petition for writ of certiorari in *Williamson v. United States,* No. 93-5256. The Court of Appeals of Maryland denied that motion for reconsideration on March 4, 1994.

At trial, it was established that Misharah Coleman was in her home at 211 North Huron Drive, in Oxon Hill, Maryland, on the night of May 17, 1990, when a knock was heard on her front door around 11:45 p.m. In the house with Coleman were Earline Coleman, who was her mother, Diedra Coleman, who was Coleman's sister, and Sharday Coleman, who was her six-year-old niece.

Misharah Coleman testified at trial that her mother answered the door and Misharah heard someone say: " 'Is Shar home?' " This was Misharah's nickname. Misharah went to the door and the man at the door, identified by Misharah as Marquette Coley, just stood there for a moment. Three other men then ran up the steps of the house, opened the screen door, and grabbed Misharah by the neck. One of the men, who wore a mask, "stuck a gun" against her neck. Mis-

harah later identified the masked man as Derrick Simmons.

The men pushed all the residents of the house into Misharah's bedroom. The men "threw" her mother, sister, and niece onto the bed. Simmons demanded "money or something." The men searched her room and found a safe. They asked for the keys to the safe but Misharah denied having any keys. After Simmons threatened to shoot Misharah's mother, Misharah produced the keys. The men opened the safe, taking $1100 in cash and jewelry valued at $2800 to $3000. Simmons and another robber left the room and searched the rest of the house. When they returned, Simmons had removed the mask from his face. The men left after being in the house for about 25 minutes.

Misharah testified to the circumstances surrounding her ability to view Simmons. She stated that her bedroom was well lit, with two 100 watt bulbs in the ceiling. When the mask was removed for about three or four seconds, Misharah saw the front of Simmons's face. Misharah noticed that Simmons had large eyes and observed his complexion. Even with the mask on, Misharah could see his eyes and mouth. When Misharah saw Simmons's face, she recalled immediately that she had seen him at Friendly High School, where she attended school. After the men left, she looked through her yearbook and found Simmons's picture. Misharah testified that she saw Simmons "all the time" at school during her senior year. Misharah also recognized Coley from school and discovered Coley's name by looking up his picture in the yearbook. Misharah later showed the book to the police. Misharah also described Simmons to the police as a "black male,

about five-ten, about 170 pounds, very light complected." He was slim and about 17 years old.

Earline Coleman also testified to the events surrounding the robbery. Her testimony corroborated Misharah's testimony, although she did not identify Simmons in court as one of the robbers. Earline did, however, give a description to the police of the masked man as being 19 or 20 years old, 5'5" tall, weighing about 140 pounds, light-skinned, and having "oversized eyelids."

The two remaining witnesses for the State were the police officers from the Prince George's Police Department who investigated the case. Detective Kenneth L. Eason testified that he took statements from the victims of the robbery on May 18, 1990. Misharah gave him a yearbook and showed him pictures of three of the robbers. Misharah told him that she went to school with the three men. The three men that Misharah pointed out were Marquette Coley, Wendell Jackson, and Derrick Simmons.

Detective Kenneth O'Berry testified that he interviewed one of the suspects, Marquette Coley, on May 31, 1990, at the Criminal Investigation Division, after Coley had been arrested. O'Berry recounted the circumstances of the interview, which included Coley's waiver of his right to remain silent. Coley gave O'Berry a written statement, which was introduced into evidence at trial after Coley refused to testify. In his statement Coley detailed the circumstances of the robbery and identified Simmons as one of the robbers. Coley's statement was consistent with the victims' accounts of the events. (*See* Appendix D (31a-36a)).

The defense presented three witnesses. Rodney Davis Smith, a high school friend of Simmons, testified that, on May 17, 1990, he and Simmons spent the day together. Smith stated that his vehicle got a flat tire sometime after 10:30 or 10:45 p.m., as the two men were on their way home. Simmons called his father and Smith called his mother. After the tire was changed, which was around 11:30 or 11:45 p.m., Smith drove Simmons home.

Earline Wright, the mother of Rodney Smith, testified that she received a phone call between 10:30 and 11:00 p.m. on May 17, 1990. Smith arrived home after 11:00 p.m. Clyde Wendell Simmons, Jr., the father of Derrick Simmons, testified that he received a phone call from his son around 11:30 p.m. The elder Simmons said that his son gave a reason for being out past his curfew and that Derrick Simmons arrived home about 20 minutes later.

REASONS FOR GRANTING THE WRIT

BASED ON THIS COURT'S DECISION IN *WILLIAMSON v. UNITED STATES*, WHICH WILL ADDRESS ISSUES IDENTICAL TO THOSE PRESENTED IN THIS CASE, THIS COURT SHOULD VACATE THE JUDGMENT OF THE MARYLAND COURT AND REMAND FOR RECONSIDERATION.

The sole issue in this case is whether the trial court properly admitted the confession of a non-testifying accomplice as a declaration against interest.[1] The

[1] Maryland has adopted the definition of a declaration against interest contained in Federal Rule of Evidence 804(b)(3). *See*

State of Maryland conceded in the Court of Appeals of Maryland that such declarations are not firmly rooted exceptions to the hearsay rule and that, therefore, particular guarantees of reliability must be established. The State argued that reliability was present in this case based on the circumstances surrounding the statement and based on other evidence corroborating the statement. The Court of Appeals of Maryland rejected the State's view that corroborating circumstances could be used, with the court premising its decision on this Court's precedent interpreting the Confrontation Clause.[2] The Court of Appeals also held that the circumstances surrounding the making of the statement were insufficient to establish its reliability.

On January 10, 1994, this Court granted review in *Williamson v. United States*, No. 93-5256, which was argued on April 25, 1994. That case presented the following three issues for review: (1) whether a post-arrest confession introduced into evidence as a declaration against interest by a non-testifying accomplice bears sufficient indicia of reliability to be admissible under the Confrontation Clause; (2) whether such a statement is a firmly rooted hearsay

---

State v. Standifur, 310 Md. 3, 10-11, 526 A.2d 955, 958-59 (1987).

[2] The Maryland Court of Appeals also cited Article 21 of the Maryland Declaration of Rights, which provides: "That in all criminal prosecutions, every man hath a right . . . to be confronted with witnesses against him. . . ." (7a). That Article and the Confrontation Clause are in *pari materia*. (7a). The Maryland court's analysis was therefore premised entirely on Confrontation Clause concerns. (7a-19a). Accordingly, the decision does not rest on an adequate and independent state ground. *See Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987).

exception; and (3) whether, in assessing the trustworthiness of such statements, only the circumstances surrounding the statement can be considered.

Although the State of Maryland in *Simmons* conceded issue two of *Williamson*, the remaining two issues of *Williamson* are exactly the same as were involved in *Simmons*. Moreover, in both cases, the declaration was a post-arrest statement to the police resulting from custodial interrogation and the declarant refused to testify at trial. The State in *Simmons* explicitly maintained that this Court, if it squarely addressed the issue, would permit the use of corroborating evidence to be used to demonstrate the reliability of the statement.

Based on the identity of the issues presented in *Williamson* and this case, Petitioner asks that this Court grant its petition and remand the case for reconsideration by the Court of Appeals of Maryland in light of this Court's decision in *Williamson*.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court grant the petition for writ of certiorari, vacate the judgment of the Court of Appeals of Maryland, and remand for reconsideration in light of *Williamson v. United States*, No. 93-5256.

Respectfully submitted,

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May 27, 1994

APPENDIX

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APPENDIX A

COURT OF APPEALS OF MARYLAND
SEPT. TERM, 1993

No. 103

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636 A.2d 463

Derrick Wenzell SIMMONS

v.

STATE of Maryland.

Jan. 28, 1994

Reconsideration Denied March 4, 1994.

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* * *

CHARLES E. ORTH, Jr., Judge (Retired), Specially Assigned.

I

On 18 May 1990 a gaggle of men invaded the home of Misharah Donise Coleman and her family in Prince George's County, Maryland and committed the crime of robbery with a deadly weapon and various other offenses. There was evidence that the men forced one of the victims to open a safe and took $1,100 in cash and jewelry valued at $2,800 to $3,000. The investigation by the police pointed to Marquette James Coley as one of the gang involved. He was arrested and taken to the Criminal Investigations Division of the Prince George's County Police Department where he was interrogated on 31 May 1990 by Detective

Kenneth O'Berry. O'Berry obtained the following statement from Coley:

> May 18, I was at a Graduation party in the neighborhood of Indian Queens with Rodney Smith and Chuck Holton. In another car was Kevin Sumpter, Valeo and Derrick Simmons. We had just got [to] the party when it was ending. So Me, Rodney, and Chuck were on our way home until we saw my buddy James Stephens. James was coming from around his girlfriend house and said, it was a party somewhere around her house. So Me and Chuck got out the car with Rodney and got in the car with James. We went looking for the party but could not find the Party. So we came over my house and sat in the front and talked for a little while.

This narrative was in Coley's handwriting. Then O'Berry posed particular questions to Coley:

> (Q) Who's [sic] party was it?
>
> (A) I'm not sure, I think maybe Dawn
>
> (Q) What time was the party?
>
> (A) We got there at about 12:00 A.M.
>
> (Q) Where is Indian Queens?
>
> (A) Near Oxon Hill Middle School.
>
> (Q) Who attended the party with you?
>
> (A) Me Rodney Smith, Chuck Holton, In another car was Kevin ~~Valo~~ Sumpter, Derrick Simmons, and Valeo (unknown last name).
>
> (Q) Do you know anything about a robbery which occurred on 5-18-90 at ~~7287 Woodhollow~~ 211 N. Huron Dr. Forest Heights?
>
> (A) I knocked on the door, she answered the door, I looked down the steps, it was a "Q", they came in. I sat at the door looking out, they said come on.

(Q) Who was with you?

(A) Me, Derrick Simmons and Chuck Holton and another person, I don't want to tell you his name.

(Q) Did you take anything?

(A) No

(Q) Did the others take anything?

(A) Not that I know of

(Q) Who had guns?

(A) Derrick Simmons, black automatic the other dude had a black automatic

(Q) Who knew the girl who lived on ~~Woodhollow~~ N. Huron

(A) I don't know, they were telling me they needed me to do something for them, she was holding the money for her boyfriend J.J. or J.R., he's a drug dealer he's in jail.

(Q) Who drove?

(A) Chuck Holton, black Horizon or something like that.

(Q) Describe the girl?

(A) B/F, 503-504, 120 lbs, 16-17 yrs old, med complex

(Q) When you knocked on the door did you say anything?

(A) No, she didn't ask who it was, I figured it was her since she was a young girl.

(Q) Who else was in the house?

(A) two ladies and a kid

(Q) Describe the ladies?

(A) B/F's, they pushed them in the room with her.

(Q) Do you know where this house is located?

(A) Somewhere off Indian Head Hway

(Q) Why won't you tell me who the 4th guy is?

(A) I don't want to snitch on someone you already know the other guys and I don't want to snitch on anyone.

(Q) Is the part about the party correct?

(A) yes, we went to the party after the robbery.

(Q) So who went to the party?

(A) Me, Rodney, Chuck, Kevin, Valeo and Derrick.

(Q) Where did you met up with these other guys?

(A) 7-11 at Allentown Rd.

(Q) Who else was driving?

(A) Kevin Sumpter, black 300 ZX

(Q) Who went in Kevin's car?

(A) Valeo & Derrick

(Q) What time did you go to the party?

(A) around 11:00 or 12:00

(Q) How long after the robbery?

(A) About 30 minutes

(Q) Earlier you said there was two ladies and a kid in the house. Did you mean these people and the young girl also?

(A) yes, two older ladies, the young girl and the kid.

(Q) Why did you take part in this robbery?

(A) it sounded easy, it was peer pressure, just knock on the door.

(Q) Have any promises or inducements been made to you to give this confession?

(A) No

(Q) Is this statement the entire truth?

(A) Yes

(Q) Is there anything else you would like to add?

(A) No

Coley initialed each answer as well as each correction and signed each of the six pages which comprised the statement.

On 19 June 1990, the Grand Jury of the State of Maryland for the body of Prince George's County returned a "True Bill" against Coley, Derrick Simmons, and Wendell Bernard Jackson II. Pursuant thereto, an Assistant State's Attorney for Prince George's County filed an eleven count indictment the next day, jointly charging Coley, Simmons, and Jackson with armed robbery and related offenses.

II

Coley's statement is the heart of the appeal before us. Simmons was separately tried by a jury in the Circuit Court for Prince George's County and found guilty of robbery with a deadly weapon, the use of a handgun in the commission of a felony, robbery, and burglary. He was duly sentenced and noted an appeal from the judgments. We granted certiorari on our own motion before decision by the Court of Special Appeals, 332 Md. 480, 632 A.2d 446.

During the course of the State's case at Simmons's trial, the prosecutor told the court at the bench that the State's

next witness was Coley. It appeared that at a former trial of Simmons, which resulted in a hung jury, Coley refused to testify, even though at the time he had accepted a plea offer in exchange for his guilty plea, had been sentenced, and the period for appeal had expired. The judge presiding at the prior trial ordered him to testify and held him in contempt when he refused to comply. The prosecutor told the court that she had just spoken to Coley and he stated that he did not intend to testify. Therefore, she said, "what the State wants to do is to introduce into evidence the statement that was made by Mr. Coley at the time of his arrest." After a brief recess, it was decided to ascertain, out of the presence of the jury, if Coley would testify. Defense counsel said he did not object to this procedure but made clear his objection to the admission of the statement if Coley refused to testify. Coley's statement was marked as State's Exhibit No. 5 for identification.

While waiting for Coley to be returned to the courtroom, defense counsel stressed his objection to the admission of the statement. When Coley appeared, he refused even to take the oath much less testify. He declaimed: "I'm not taking an oath. I'm not going to testify." Threatened with being held in contempt for failure to take the oath, Coley said he had been all over that at the prior trial. He resisted strong pressure by the judge and despite repeated attempts to swear him refused to take the oath. During all this, counsel were fervidly arguing the issue. The judge finally said that the State could authenticate the statement. The jury was brought back in and O'Berry testified as to the obtaining of the statement. The next thing that happened was that the State rested and the defense moved for a judgment of acquittal. The motion was denied and the court recessed for the day.

The next day, defense counsel reminded the court that it had not ruled on the admission of the statement. The court allowed counsel to reargue the issue further. As it was apparent that the judge was going to admit the state-

ment in evidence, defense counsel asked for a mistrial and if the motion was denied, counsel requested a motion to strike O'Berry's testimony. Both motions were denied. The judge indicated that he had intended to admit the statement the day before. But, the court said: "[S]o the record is mighty clear now, the State's Exhibit 5 is admitted."

III

A

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States declares:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Confrontation Clause of Article 21 of the Maryland Declaration of Rights proclaims:

> That in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him. . . [1]

B

The Supreme Court has accepted hearsay as

> "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted

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[1] The confrontation requirements of the Sixth Amendment are applicable to the states through the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Franklin v. State*, 239 Md. 645, 212 A.2d 279 (1965).

The Confrontation Clauses of the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights are in *pari materia*. *Craig v. State*, 322 Md. 418, 430, 588 A.2d 328 (1991).

> therein, and thus resting for its value upon the credibility of the out-of-court asserter."

Lee v. Illinois, 476 U.S. 530, 543 n. 4, 106 S.Ct. 2056, 2063 n. 4, 90 L.Ed.2d 514 (1986), quoting E. Cleary, *McCormick on Evidence* § 246, p. 584 (2d ed. 1972). Coley's statement, offered by the State as substantive evidence against Simmons, was hearsay. The basic rule is that hearsay is not admissible. If the language of the Confrontation Clauses were taken literally, any statement made by a declarant not at the trial would be excluded. *See Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980). But the Supreme Court has consistently held that the Confrontation Clause "does not necessarily prohibit the admission of hearsay statements against a criminal defendant. . . ." *Idaho v. Wright,* 497 U.S. 805, 813, 110 S.Ct. 3139, 3145, 111 L.Ed.2d 638 (1990). *See Lee v. Illinois,* 476 U.S. at 543-544, 106 S.Ct. at 2063-2064; *Roberts,* 448 U.S. at 63, 100 S.Ct. at 2537. The Supreme Court has declared that it cannot be seriously doubted that

> "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."

Lee, 476 U.S. at 539, 106 S.Ct. at 2061, quoting *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). In *Roberts,* however, "the Court held that cross-examination of a hearsay declarant can be dispensed with when a party demonstrates: (1) the necessity of introducing the out-of-court statement, and (2) the out-of-court statement bears adequate indicia of reliability." *Chapman v. State,* 331 Md. 448, 455, 628 A.2d 676 (1993), citing to *Roberts,* 448 U.S. at 65-66, 100 S.Ct. at 2538-2540. *See Moon v. State,* 300 Md. 354, 367, 478 A.2d 695 (1984), *cert. denied,* 469 U.S. 1207, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985). The first prong of the *Roberts* approach was construed as requiring the showing of the unavailability of the declarant or a demonstration of

unsuccessful good faith efforts to secure the declarant's presence. *Chapman,* 331 Md. at 467, 628 A.2d 676. Then, in *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), the Court declared:

> *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. 475 U.S. at 394, 106 S.Ct. at 1125. It held that the unavailability of a conspirator need not be shown to admit a coconspirator's hearsay declaration made during the course of the conspiracy. *Id.* 475 U.S. at 399-400, 106 S.Ct. at 1128-1129. In *White v. Illinois,* ___ U.S. ___, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), the Court again indicated that the unavailability requirement established in *Roberts* does not apply to all forms of hearsay. *Id.* ___ U.S. at ___, 112 S.Ct. at 741-742. The Court explained that "the Confrontation Clause does not require an initial showing of unavailability prior to admitting out-of-court statements which are spontaneous declarations or are made for the purposes of attaining medical diagnosis or treatment as substantive evidence for the State's case." *Chapman,* 331 Md. at 469-470, 628 A.2d 676, citing to *White,* ___ U.S. at ___, 112 S.Ct. at 743. Thus, *Chapman* concluded, "it appears that the Supreme Court has emphasized that *Roberts* contemplated a rule of necessity, not one of availability." 331 Md. at 470, 628 A.2d 676. So, in *Chapman,* we held that the unavailability of the makers of reliable business records was not a prerequisite for the admission of these records.

Where the rule of necessity has been satisfied, the second prong of the Roberts approach is triggered, namely, that the hearsay declaration be reliable. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts,*

448 U.S. at 66, 100 S.Ct. at 2539. We pointed out in *Chapman,* 331 Md. at 457, 626 A.2d 676:

> Where the hearsay in question falls within a "firmly rooted" hearsay exception "no independent inquiry is required. . . ." *Bourjaily v. United States,* 483 U.S. 171, 183, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144, 157 (1987).

IV

A

The objection of defense counsel to the admission of Coley's statement was on the grounds that it was hearsay and that it violated Simmons's right to confront the witnesses against him bestowed by the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights. The judge's ruling that the statement was admissible was based on the penal interest exception to the hearsay rule. He made no specific findings but "conclude[d] that the tests set forth in *Adkins* have been met. . . ." *Adkins v. State,* 72 Md.App. 493, 531 A.2d 699 (1987), *rev'd on other grounds,* 316 Md. 1, 557 A.2d 203 (1989), discussed the penal interest exception as recognized by the Supreme Court and this Court. *Id.* 72 Md.App. at 502-504, 531 A.2d 699. *Adkins* referred to the test described in *State v. Standifur,* 310 Md. 3, 17, 526 A.2d 955 (1987) for the admissibility of a declaration against penal interest against both a hearsay and Confrontation Clause objection. The trial judge believed that Coley's statement was indeed inculpatory and against Coley's penal interest was a "well founded" hearsay exception thereby inferring reliability without more. The judge opined that, although the reasoning in *Adkins* was applicable to this case, Coley's statement was admissible "for more reasons than are set forth in . . . *Adkins.*" Those additional reasons, the judge declared, arose because the court and the jury were involved in a search for the truth. He said:

> And the jury is entitled to hear relevant, probative information. In fact, it's necessary for the jury to hear relevant, probative information. For them not to hear it is a denial of the principles concerning the search for the truth.

Of course, the ascertainment of the truth is the alpha and omega of every criminal trial. But under our system of criminal justice, the search for the truth is not always the decisive criterion for admissibility of evidence and at times suffers some restraints. This is so when the evidence, although relevant and probative and tending to disclose the truth, infringes on personal rights. For example, when a confession, otherwise freely and voluntarily given and plainly relevant and probative, is inadmissible for the failure of the authorities to comply with the dictates of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Or when contraband, although certainly relevant and probative, is inadmissible because the search for it and the seizure of it offended the Fourth Amendment to the United States Constitution. The point is that although the consideration by the jury of Coley's statement may have helped the jurors determine Simmons's guilt or innocence that fact, as such, plays no part in the question of its admissibility. Rather, the password is the "reliability" of the hearsay declaration, not whether it is harmful or helpful.

B

Before us, the State, in its brief and at oral argument, conceded that the penal interest exception to the hearsay rule is not a firmly rooted one. It said: "The declaration against interest exception is a fairly recent exception to the hearsay rule," citing *Standifur*, 310 Md. at 9-10, 526 A.2d 955.[2]

---

[2] The Supreme Court has indicated several classic hearsay exceptions

> [W]here hearsay statements are admitted under an exception which is not considered "firmly rooted," then they are "presumptively unreliable and inadmissible for Confrontation Clause purposes" and must be excluded, at least absent a " 'showing of particularized guarantees of trustworthiness.' "

Chapman, 331 Md. at 457, 628 A.2d 676. *See Lee,* 476 U.S. at 543, 106 S.Ct. at 2063; *Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539.

> These guarantees of trustworthiness must be such that the evidence is "at least as reliable as evidence admitted under a firmly rooted hearsay exception" so as to assure "that adversarial testing would add little to its reliability."

Chapman, 331 Md. at 457, 628 A.2d 676, quoting *Wright,* 497 U.S. at 821, 110 S.Ct. at 3149.

C

(1)

The prosecutor established that Coley was "unavailable." As we have seen, Coley was brought into the courtroom and although he was physically present and seated on the witness stand, he flatly refused to testify. Not subject to cross-examination, he was "unavailable" with respect to the hearsay exception and the Confrontation Clause. The rule of necessity was satisfied. *See California v. Green,* 399 U.S. 149, 168 n. 17, 90 S.Ct. 1930, 1940 n. 17, 26 L.Ed.2d 489 (1970); Fed.Rule Evid. 804(a)(1); 2 John William Strong, *McCormick on Evidence* § 253 (4th ed. 1992); *Lee,* 467 U.S. at 550-551, 106 S.Ct. at 2067 (Blackmun, J. dissenting).

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that fall within the "firmly rooted" category. A declaration against penal interest is not one of them. *See Chapman v. State,* 331 Md. 448, 457 n. 3, 628 A.2d 676 (1993).

(2)

Because the penal interest exception is not a firmly rooted one does not mean that Coley's statement is therefore inadmissible. But for it to be admissible the burden is on the State to establish that it is cloaked with "indicia of reliability." This means that there must be a "showing of particularized guarantees of trustworthiness." *Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539; *Lee,* 476 U.S. at 543, 106 S.Ct. at 2063. The Supreme Court has declined "to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause," *Wright,* 497 U.S. at 822, 110 S.Ct. at 3150, although it noted that the courts have considerable leeway in their consideration of appropriate factors to determine the existence of particularized guarantees of trustworthiness. *Id.* One of the factors which a court may not consider, however, is other corroborative evidence. It once was that a statement of the defendant could be looked to in establishing the reliability of the hearsay statement. The "interlocking" nature or meshing of the codefendant's and defendant's statements could be considered in determining whether the hearsay statement enjoyed the required "particularized guarantees of trustworthiness." *See Lee,* 476 U.S. at 543-546, 106 S.Ct. at 2063-2065; *Cruz v. New York,* 481 U.S. 186, 192-194, 107 S.Ct. 1714, 1718-1720, 95 L.Ed.2d 162 (1987). In *Wright,* 497 U.S. 805, 110 S.Ct. 3139, the Supreme Court jettisoned such use of corroborative evidence. The Court made clear that although " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances," the only relevant circumstances are "those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.,* 497 U.S. at 819, 110 S.Ct. at 3148. *See id.,* 497 U.S. at 820, 110 S.Ct. at 3149. The Court was not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of

trustworthiness.' " *Id.* 497 U.S. at 822, 110 S.Ct. at 3150. In sum:

> [H]earsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

Id.

V

Applying the teachings of the Supreme Court as they evolved from *Lee* through *Roberts, Wright* and *White,* and, in the light of our *Chapman* and *Standifur,* we proceed to determine whether the trial court abused its discretion in admitting Coley's statement.

We note first that Coley's statement is not now challenged on the ground that it was involuntary. Second, although the trial court and the State were of the view that Coley's statement was against his penal interest while Simmons believed that it was not, we need not decide whether it did or did not meet the stringent test set out in *Standifur* which must be established by the proponent to qualify a statement as a declaration against penal interest. *See Standifur,* 310 Md. at 17, 526 A.2d 955. The State now recognizes that a declaration against penal interest is not a firmly rooted exception to the hearsay rule, a view in which we are in complete accord. Coley's statement implicated Simmons as well as Coley. Therefore, as a threshold requirement, the statement had to be marked by particularized guarantees of trustworthiness sufficient to overcome the presumption that it was unreliable. We do not believe that the required particularized guarantees of trustworthiness were shown under the restraints imposed by *Wright* in determining them.

The State, claiming that Coley's statement was admissible, asserts that *Wright's* rejection of corroborative evi-

dence "should not be applied in this case for several reasons." First, it said, *Wright's* discussion of confessions "was dicta by a bare majority." Second, there was a "strong dissent" representing four of the five Justices. Third, "the Supreme Court in cases specifically concerned with confessions has indicated that corroborating circumstances are a valid consideration," citing to *Lee* and *Cruz*. Fourth, the State avers, this Court in *Bailey v. State*, 327 Md. 689, 700-701, 612 A.2d 288 (1992) "recognized the permissibility of examining corroborating circumstances." We are by no means persuaded by those reasons. First, we do not deem the *Wright* rejection of corroborating evidence to be dicta. Second, that there was a "strong dissent" is of no matter. A majority of the court were in agreement that the use of corroborating evidence to establish the reliability of a hearsay declaration was improper. Third, the majority of the Court, as we have seen, shot down its prior holdings that corroborating evidence could be used. Fourth, *Bailey* is clearly distinguishable and is not contrary to *Wright*. The State goes on to look to the testimony of the victims as corroborating Coley's statement. This it may not do.

The State then takes the position that even if corroborating evidence may not be used, Coley's statement was admissible "because of the indicia of reliability surrounding the taking of the statement." "One valid consideration," the State urges, "is the willingness of [Coley] to talk to the police." The State declares:

> Coley voluntarily confessed to the police. There was no suggestion that Coley was in any way threatened, coerced, or induced into making the statement. Indeed, the waiver of rights form was introduced into evidence, demonstrating a voluntary and knowing relinquishment of the right to remain silent.

This may be so, but it does not go far in establishing the reliability of the statement. A statement's spontaneity is

an important factor in determining reliability under the Confrontation Clause. *See State v. Cook*, 135 N.H. 655, 610 A.2d 800, 806 (1992), citing *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970). Coley's statement was clearly not spontaneous. He was taken into custody, confronted with the crimes, transported to the Criminal Investigations Division of the Police Department, placed in a six-foot by eight-foot interview room containing a table and a couple of chairs, and interrogated by Officer O'Berry. The first part of his statement was a narrative in his handwriting which made no mention whatsoever of the robbery. It was only upon specific questions posed by O'Berry that Coley discussed the robbery, and then obviously with reluctance.

The State urges that "[a]nother valid consideration is an examination of the 'age, education, background, experience and condition of the declarant,' " quoting *Standifur*, 310 Md. at 12, 526 A.2d 955. Coley was 18 years of age at the time he made the statement. He was in the 12th grade of Friendly High School, could read and write and did not appear to be under the influence of drugs or alcohol. All of this indicates that Coley knew exactly what he was doing but it does not establish that what he told the police was the truth. His character tended to make his statement suspect. He was streetwise and willingly joined the gang to commit the crimes. He had no compunction about participating—"it sounded easy, it was peer pressure, just knock on the door."

Another factor the State suggests is the motive of the confessor. Did he desire to mitigate his own involvement or to overstate the involvement of the person he implicated? A "reality of the criminal process," the Supreme Court noted in *Lee*, 476 U.S. at 544-545, 106 S.Ct. at 2064-2065, is

> that once partners in a crime recognize that "the jig is up," they tend to lose any identity of interest and

> immediately become antagonists, rather than accomplices.

"Taking on the full blame for a minor role in an offense . . . does little to demonstrate trustworthiness because the declarant still has the motive to shift the blame to others so as to receive a lesser penalty." *United States v. Flores*, 985 F.2d 770, 782 (5th Cir. 1993). Coley admitted only to playing a minor role—knocking on the door; he denied taking anything, and put the weapons used in the hands of other members of the gang. Asked if the others took anything he replied, "not that I know of." He curried favor with the police by verifying the identity of Simmons. The police knew that Simmons had participated. Coley refused to give the name of another participant the police did not know about because he did not "want to snitch on anyone." This, Simmons suggests, "cuts against the State in two ways."

> First, it suggests that Coley repeated the name to please the police while avoiding having to reveal his confederates' identities. Second, the State is prohibited from arguing that this makes the confession more reliable, because it bootstraps the other independent evidence in the case, [a victim's] identification of Simmons, evidence which the *Wright* Court said cannot be used to make a showing of "particularized guarantees of trustworthiness."

We are not persuaded by the reasons advanced by the State that Coley's statement was admissible. From our perusal of the statement and the circumstances surrounding the obtaining of it, in the light of *Wright*, we are not satisfied that the State has met its burden of overcoming the presumption that the statement is unreliable; the statement itself and the circumstances under which Coley made it did not establish the particularized guarantees of trustworthiness required to render it admissible. In short, the statement was unreliable and therefore inadmissible. It fol-

lows that the trial judge abused his discretion when he admitted the statement in evidence over objection; the receipt in evidence of the challenged statement was erroneous.

VI

Wright indicated that corroborative evidence may be used to determine whether a hearsay statement was harmless. 497 U.S. at 823, 110 S.Ct. at 3150. The corroborating evidence here was the testimony of the victims. It showed that the error was harmful. Simmons was masked during the robbery. He removed the mask for a short time enabling one of the victims to see his face. She remembered seeing him at Friendly High School. She identified the masked man as Simmons from his school yearbook picture. Another victim could not identify Simmons but gave the police a description of him. The defense produced three witnesses. Their testimony was in the nature of an alibi, tending to show that Simmons could not have been present at the scene of the crime. Also, a witness for the defense testified that Simmons attended Gwenn Park High School in the morning and Friendly High School in the afternoon, contrary to the time that the identifying victim said she attended Friendly High School. It is quite apparent that Coley's statement served in a large and significant measure to buttress the identification of Simmons. The importance of the statement to the State's case is indicated by the fact that the first trial of Simmons, which was conducted without Coley's statement in evidence, resulted in a mistrial because the jury could not agree.

In light of all this, we are not satisfied that the rigid standard we adopted in *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976) has been met. On our own independent review of the record, we are not able "to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict. . . ." *Id.*, 276 Md. at 659, 350 A.2d 665. We hold that the error was not harmless. We note

that, in any event, the State declared that it does not contend that any error in admitting Coley's statement was harmless.

Having found that the trial court erred in admitting Coley's statement over objection and that the error was not harmless, we hold that Simmons is entitled to a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED;

CASE REMANDED TO THAT COURT WITH DIRECTION TO VACATE THE JUDGMENTS AGAINST DERRICK WENZELL SIMMONS AND ORDER A NEW TRIAL;

COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

APPENDIX B

MANDATE

COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1993

No. 103

DERRICK WENZELL SIMMONS

v.

STATE OF MARYLAND

January 28, 1994—Judgments of the Circuit Court for Prince George's County reversed; case remanded to that Court with direction to vacate the judgments against Derrick Wenzell Simmons and order a new trial; Costs to be paid by Prince George's County. Opinion by Orth, J.

February 23, 1994—Motion for Reconsideration filed by counsel for respondent.

March 4, 1994—Motion for reconsideration denied.

STATEMENT OF COSTS:

In Circuit Court:

Record	$60.00
Stenographer's Costs	$682.50

In Court of Appeals:

Petition Filing Fee	
Printing Brief for Appellant	$ 302.40
Portion of Record Extract—Joint	1,315.20
Reply Brief	
Appearance Fee—Appellant	10.00
Filing Fee on Appeal (Court of Special Appeals)	

Printing Brief for Appellee	163.20
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00
Motion for Reconsideration	25.00
Total	$1,825.80

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this fourth day of March, 1994.

/s/ Alexander L. Cummings
Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

APPENDIX C

* * *

THE COURT: All right, Counsel, I've now had an opportunity to review the two cases that the State wanted me to review.

MS. KNIGHT: Your Honor, the—the State, after speaking with Mr. Coley today, is of the opinion that he's not inclined to testify here today. So what the State wants to do is to introduce into evidence the statement that was made by Mr. Coley at the time of his arrest.

I believe that the case law that I presented to you, *Bond v. State,* 92 Maryland App. and *Adkins v. State,* 72 Maryland App., both allow the State to introduce into evidence the statement of a witness who is unavailable, if there is some indicia of reliability. The defendant in this case is unreliable—I'm sorry, is unavailable because he refuses to testify, despite the fact that the Court has ordered him to testify.

When this case was last—

THE COURT: The Court did in the last trial.

MS. KNIGHT: At the last trial, that's—

THE COURT: I haven't—

MS. KNIGHT: —right.

THE COURT: —done anything yet.

MS. KNIGHT: I understand, Your Honor. What the—well, maybe I should shorten my argument and just ask, first, that perhaps—the State is suggesting that Mr. Coley be brought in out of the presence of the jury to determine if he's going to testify. If he fails to testify after the Court has ordered him to do so, then the State would be asking—

THE COURT: What's the status of his case?

MS. KNIGHT: He has already entered a plea. He's—

THE COURT: Of guilty?

MS. KNIGHT: Yes, and he's serving time in the Department of Corrections.

THE COURT: And the appeal time has run, and no appeal has been—

MS. KNIGHT: That's right.

THE COURT: —taken?

MS. KNIGHT: He entered—

THE COURT: All right.

MS. KNIGHT: —his plea back in—

THE COURT: There's—there's no basis of inserting—asserting a self-incrimination privilege that you're aware of?

MS. KNIGHT: No. No—

THE COURT: All right.

MS. KNIGHT: —Your Honor. That was established with Judge Salmon. He entered a plea.

THE COURT: And then Judge Salmon ordered him to testify, and he didn't testify. Was any of that done in front of the jury?

MS. KNIGHT: No.

THE COURT: That was done all outside of the hearing—

MS. KNIGHT: Yes.

THE COURT: —of the jury? All right.

MS. KNIGHT: He entered a plea back in, it looks like, March of '91, Mr. Coley did.

THE COURT: All right. Mr. Drew?

MR. DREW: Your Honor, I—I—I don't oppose the Court voir diring him as to whether or not he wishes to testify,

because that's the procedure that's—that seems to be laid out in the case law. I don't—

THE COURT: Well, the only thing—the—the only difference is you could concur with the State and say that that's not necessary; you don't have to, or we can go through the procedure and bring him into court and do that. It's your choice on that issue.

MR. DREW: I'll—I will go through the procedure because—

THE COURT: All right.

MR. DREW: —I don't think it's going to take long, number one.

THE COURT: It's—

MR. DREW: Number two—

THE COURT: It won't take long—

MR. DREW: —assuming—

THE COURT: —at all.

MR. DREW: —assuming arguendo that he does not testify, as the State has indicated in this case, I would object to the introduction of this statement. I had an opportunity to read one of the two cases that the State relies upon. In that case, there were two arguments that were advanced.

One was a hearsay objection, and secondly, was a—an objection on Sixth Amendment grounds, and that is the ability to cross-examine.

THE COURT: Confrontation grounds?

MR. DREW: Confrontation. And—

THE COURT: *Adkins* discusses both of those.

MR. DREW: Right, and I believe—

THE COURT: And—and—and says that, as I read *Adkins,* that—Judge Wilner says that if a witness is truly unavailable, that the confrontation clause does not—exemption does not exist for—for your side of the argument.

MR. DREW: Well—

THE COURT: Do you—do you claim he says something else? You might not agree with what he says, but—

MR. DREW: I don't agree with—

THE COURT: I understand that.

MR. DREW: —what he says, and I—and I believe that—that for—

THE COURT: You do not agree with what—

MR. DREW: I don't agree with—with what Judge Wilner says.

THE COURT: But you agree that he said what I—how I've characterized it?

MR. DREW: I think what he said basically is—is that the Court has to go through an analysis and make some threshold determinations and that the burden is on the State to meet those—those determinations. The Court must determine reliability of the statement, and it must examine whether or not the statement is truly a declaration against penal interest or whether it is merely a statement which tends to inculpate someone else in order to take the blame off of themselves.

THE COURT: Well, that goes—

MR. DREW: (Inaudible) to the—

THE COURT: —to the—

MR. DREW: —Court was (inaudible).

THE COURT: That goes to the hearsay—

MR. DREW: That goes—

THE COURT: —niche.

MR. DREW: That goes to the hearsay and whether it's truly reliable or not. Then we—then we go over to the confrontation ground, and I think that in order for the Court to make an adequate determination of this, I think it ought to read some of the Supreme Court cases that are cited in *Adkins.*

THE COURT: Well, I'll be hear—happy to hear your rendition of those.

MR. DREW: Well, Your Honor, had I known that I was going to have to make this argument today, I would have been more than happy to provide the Court with my rendition of those cases, but I didn't bring them here today.

THE COURT: All right.

MR. DREW: I mean, I had no advance notice of this procedure. So I can't—

THE COURT: Not since 1990 anyway.

MR. DREW: I had no advance notice at any time that this procedure—with the last time, the State didn't see fit to attempt to introduce that statement, and I didn't know they were going to—

THE COURT: Well, you know—

MR. DREW: —(inaudible).

THE COURT: —the statement exists, and you know that the defendant—

MR. DREW: I know—

THE COURT: —hasn't—

MR. DREW: I know the statement—

THE COURT: —testified previously.

MR. DREW: —exists. Yes, I do.

THE COURT: All right. Well, let's bring the witness into the courtroom.

MS. KNIGHT: Are you talking about Mr. Coley? Is that right, Your Honor?

MR. DREW: Your Honor, while the Deputy is getting Mr. Coley, I'd want to have marked for the purpose of this hearing a copy of the statement of Mr. Coley for the Court to look at and consider in order to make its evaluation, and Ms. Knight is getting a clean copy for—

MS. KNIGHT: Your Honor, the State has a copy of Mr. Coley's statement.

THE COURT: You can mark it as the State's next exhibit.

(State's Exhibit No. 5 was marked for identification.)

MS. KNIGHT: State's Exhibit, Your Honor.

THE CLERK: Judge, a lack of communication.

THE COURT: What?

THE CLERK: He's on a bus right now. I can get him back.

THE COURT: All right.

THE CLERK: They can have him back within five minutes.

THE COURT: All right. Tell him to bring him back. All right. Do you want to tell me why that isn't an inculpatory statement?

MR. DREW: I'd submit on what I said, Your Honor. I—I—I—I don't believe it does anything other than inculpate Mr. Simmons' having the weapon. The most it says is, "Why did you do the robbery?" And then—and it says,

"It sounded easy. It was peer pressure." And I would suggest to the Court that, again, I think the Sixth Amendment argument, the confrontation argument, is a valid argument, and I think when it comes to a constitutional right and yielding to an evidentiary principle on admissibility, I think the constitutional right is supreme.

I believe that that is stated in the case law, which I don't have here. Again, it was a surprise to me, and I would suggest that under those circumstances, it should not be admitted in this case. And there is no independent indicia of reliability in this case, absolutely none that's been proffered itself.

THE COURT: What do you mean by independent?

MR. DREW: Well, the—as I read that case very quickly, it says there has to be something else.

THE COURT: I assume you read it in the same amount of time that I read it in?

MR. DREW: Yes, I did.

THE COURT: During the recess?

MR. DREW: During the recess.

THE COURT: All right.

MR. DREW: And during that period of time, I read something in the opinion to the effect—if the Court would indulge me. It just says something to the effect there has to be a determination that it's, in fact, reliable. I—I don't have anything further to argue, Your Honor. That would—

MS. KNIGHT: Your Honor, I believe that reliability is addressed on—on page 502 of the *Adkins v. State* case, where it says that "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." And the firmly rooted hearsay exception is the declaration against penal interest.

MR. DREW: If I may, I have one other point, and I'll sit down. Your Honor, what this—if the Court allows this procedure in this particular case, to allow this statement in to—to inculpate my client, it puts him at a choice of either exercising his Fifth Amendment right or not.

THE COURT: No different choice than if—if the witness himself testified.

MR. DREW: It's a completely different thing because I can cross-examine the witness if the witness testifies. In this case, I can't examine a document. I think there's—it's—it's a completely different situation for that reason. He has the Hobson's choice of either testifying or sitting here and being stuck with that statement that he's not had an opportunity to cross-examine, and I don't think *Adkins* discusses it from that particular point of view. And I believe under those circumstances, the Court must decide it under both a Sixth Amendment ground, as well as a Fifth Amendment ground and whether he's being deprived of his Fifth Amendment privilege not to testify.

THE COURT: Well, the Court has to ultimately look at contested issues that come before the—this tribunal in terms of the function of the judicial branch of the government, and one of those prime functions is a search for the truth. And when a witness refuses to testify in court, then there is a suppression of truth, and the—and the search for truth can never go forward if witnesses refuse, without justified reason, to testify.

So for more reasons than are set forth in—in the *Adkins* case, although the reasoning in *Adkins* is applicable to this case, the jury and the—and the Court is—is involved in a search for the truth. And the jury is entitled to hear relevant, probative information. In fact, it's necessary for the jury to hear relevant, probative information. For them not to hear it is a—is a denial of the principles concerning the search for the truth.

So here we have a situation where the issue is—and I—of course, I'm going to have to hear from this witness, who's on his way into the courtroom as we—as we sit here, but assuming this witness again, as he has before, refuses to testify, without justifiable reason, the—the State has alternative ways to present the information they contend bear on the truth. This is one of the ways that they can do that, and it meets the—the hearsay exception test and concepts concerning the confrontation clause of the Constitution.

* * *

APPENDIX D

WAIVER OF RIGHTS AND STATEMENTS

CASE # 90-138-611

I, Kenneth O'Berry (Officer) have identified myself to you as a Police Officer of the Prince George's County Police (Department).

MC 1. You have the right to remain silent.

MC 2. Anything you say or write may be used against you in a court of law.

MC 3. You have the right to talk to a lawyer before any questioning and to the presence of a lawyer before answering any questions or at any time while questioned.

MC 4. If you want a lawyer and cannot afford to hire one, you shall not be asked any questions and the court will be requested to appoint a lawyer for you.

MC 5. If you agree to make a statement, you may stop at any time and request the presence of a lawyer and that no further questions will be asked of you.

MC 6. I have read or had read to me this explanation of my rights and I understand this explanation. I hereby declare, with full knowledge and understanding of my rights, that I do not want a lawyer at this time. I am willing to answer questions and I wish to make a statement Yes MC .

MC 7. No promises or inducements have been offered to me by anyone; I have not been threatened or intimidated by anyone and I have not been forced to make a statement. My decision to make a statement is entirely free and voluntary. Yes MC

I understand my rights. Yes MC

Cpl. Kenneth O'Berry 1308	Marquette James Coley
OFFICER ADVISING THE RIGHTS	SIGNATURE OF PERSON MAKING STATEMENT
5/31/90 1029 HRS.	
DATE TIME	WITNESS OF THE SIGNATURE

Friendly High School 12th Grade
Ready Write—Yes

P.G.C. Form #2628 (Rev. 1/84)

PRINCE GEORGE'S COUNTY POLICE DEPARTMENT

STATEMENT OF VICTIM/WITNESS/SUSPECT

CCN: 90-138-611 DATE: 5/31/90 TIME: 1038

STATEMENT OF: Marquette James Coley
HOME ADDRESS: 7287 Woodhollow Terr Ft. Wash
PHONE: 248-3454
BUSINESS ADDRESS: Friendly High School
PHONE: N/A SEX/RACE/DOB: I/M 2/12/72
POB: Wash D.C.
HEIGHT: 601 WEIGHT: 215-220 HAIR: Blk
EYES: Bro SSN: 577-86-9172 DRIVER'S LICENSE NO: MD
TYPE OF OFFENSE: RDW
STATEMENT TAKEN BY: O'Berry 1308 LOCATION: CID

STATEMENT: May 18, I was at a Graduation party in the neighborhood of Indian Queens with Rodney Smith and Chuck Holton. In another car was Kevin Sumpter, Valeo and Derrick Simmons. We had just got the party when it was ending. So Me, Rodney, and Chuck were on our way home until we saw my buddy James Stephens. James was coming from around his girlfriend house and said, it was a party somewhere around her house. So Me and Chuck got out the car with Rodney and got in the car with James. We went looking for the party but could not find the Party. So we came over my house and sat in the front and talked for a little while.

I HAVE READ THE ABOVE STATEMENT CONSISTING OF ___ PAGE(S). THIS STATEMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

_____ Marquette Coley

WITNESSED BY SIGNATURE

P.G.C. Form #2998 3/84

STATEMENT OF VICTIM/WITNESS/SUSPECT (CONT.)

NAME: Coley, Marquette CCN: 90-138-611

STATEMENT:

(Q) Who's party was it?

MC (A) I'm not sure, I think maybe Dawn

(Q) What time was the party?

MC (A) We got there about 12:00 A.M.

(Q) Where is Indian Queens?

MC (A) Near Oxon Hill Middle School.

(Q) Who attended the party with you?

MC (A) Me Rodney Smith, Chuck Holton, In another car was Kevin ~~Vale~~ Sumpter, Derrick Simmons, and Valeo (unknown last name).

(Q) Do you know anything about a robbery which occurred on 5-18-90 at ~~7287 Woodhollow~~ 211 N. Huron Dr. Forest Heights? MC

MC (A) I knocked on the door, she answered the door, I looked down the steps, it was a "Q", they came in. I sat at the door looking out, they said come on.

(Q) Who was with you?

MC (A) Me, Derrick Simmons and Chuck Holton and another person, I don't want to tell you his name.

(Q) Did you take anything?

MC (A) NO

(Q) Did the others take anything?

MC (A) Not that I know of

(Q) Who had guns?

MC (A) Derrick Simmons, black automatic the other dude had a black automatic

(Q) Who knew the girl who lived on ~~Woodhollow~~ N. Huron

MC (A) I don't know, they were telling me they needed me to do something for them, she was holding the money for her boyfriend J.J. or J.R., he's a drug dealer he's in jail.

(Q) Who drove?

MC (A) Chuck Holton, black Horizon or something like that.

(Q) Describe the girl?

MC (A) B/F, 503-504, 120 lbs, 16-17 yrs old, med complex

(Q) When you knocked on the door did you say anything?

MC (A) No, she didn't ask who it was, I figured it was her since she was a young girl.

(Q) Who else was in the house?

MC (A) two ladies and a kid

(Q) Describe the ladies?

MC (A) B/F's, they pushed them in the room with her.

(Q) Do you know where this house is located?

MC (A) Somewhere off Indian Head Hway

(Q) Why won't you tell me who the 4th guy is?

MC (A) I don't want to snitch on someone you already know the other guys and I don't want to snitch on anyone.

(Q) Is the part about the party correct?

MC (A) yes, we went to the party after the robbery.

(Q) So who went to the party?

MC (A) Me, Rodney, Chuck, Kevin, Valeo and Derrick.

(Q) Where did you met up with these other guys?

MC (A) 7-11 at Allentown Rd.

(Q) Who else was driving?

MC (A) Kevin Sumpter, black 300 ZX

(Q) Who went in Kevin's car?

MC (A) Valeo & Derrick

(Q) What time did you go to the party?

MC (A) around 11:00 or 12:00

(Q) How long after the robbery?

MC (A) About 30 minutes

(Q) Earlier you said there was two ladies and a kid in the house. Did you mean these people and the young girl also?

MC (A) yes, two older ladies, the young girl and the kid.

(Q) Why did you take part in this robbery?

MC (A) it sounded easy, it was peer pressure, just knock on the door.

(Q) Have any promises or inducements been made to you to give this confession?

MC (A) No

(Q) Is this statement the entire truth?

MC (A) Yes

(Q) Is there anything else you would like to add?

MC (A) No

/s/ Marquette Coley

WITNESSED BY SIGNATURE

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No. 93-1922

In The

Supreme Court of the United States

October Term, 1994

STATE OF MARYLAND,

Petitioner,

v.

DERRICK WENZELL SIMMONS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE MARYLAND COURT OF APPEALS PROPERLY RULED THAT THE ADMISSION OF A NON-TESTIFYING CODEFENDANT'S WRITTEN CONFESSION INCULPATING THE RESPONDENT WAS ERROR?

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No. 93-1922

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STATE OF MARYLAND,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The Petitioner has requested that this Court "grant the petition for writ of certiorari, vacate the judgment of the Court of Appeals of Maryland, and remand for reconsideration in light of *Williamson v. United States*, No. 93-5256." Petition for a writ of certiorari 9 (Pet.cert.). The petition was filed before *Williamson v. United States*, No. 93-5256 (June 27, 1994) was decided. *Williamson* decided an issue of federal law under the Federal Rules of Evidence and did not reach the issue raised by the Petitioner under the Confrontation Clause. The Federal Rules of Evidence do not apply in state court. The Court has jurisdiction to consider the Confrontation Clause issue

pursuant to 28 U.S.C. § 1257(a). The Court has no jurisdiction to consider whether Maryland should follow *Williamson*.

STATEMENT OF THE CASE

The Respondent, Derrick Wenzell Simmons, was convicted by a Prince George's County jury of robbery with a deadly weapon, use of a handgun in the commission of a felony, robbery, and burglary.[1] Simmons received three concurrent sentences of twenty years with all but nine years suspended, followed by five years probation.

Simmons appealed to the Maryland Court of Special Appeals. The Maryland Court of Appeals on its own motion issued a writ of certiorari and reversed. The court held the trial court erroneously admitted in evidence the written confession of a nontestifying codefendant which inculpated the Respondent, in violation of the Confrontation Clause of the Sixth and Fourteenth Amendments and Article 21 of the Maryland Declaration of Rights.

The testimony showed that on May 17, 1990 and into the early morning hours of May 18, 1990, Misharah Coleman, her mother, Earline Coleman, and other family members were at their home on 211 N. Huron Dr., Forest Heights, Maryland. At approximately 11:48 p.m., four individuals arrived at the Coleman's home. One of them knocked on the door. Shortly thereafter they came into the home and forced the Colemans into a rear bedroom at gunpoint.

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[1] The petition for a writ of certiorari misspelled the Respondent's name as "Derrick Wendell Simmons."

One of the individual suspects was wearing a dark blue ski mask. Misharah Coleman and Earline Coleman indicated that the only portion of the masked suspect's face that could be seen was around his eyes and mouth, because the mask was somewhat loose fitting. Misharah Coleman stated that at some point the masked suspect and another suspect left the room and upon their return, the masked suspect did not have his mask down for a period of approximately three to four seconds. At that point, she testified she was able to observe his face. Earline Coleman testified that although she was in the room with her daughter, she never saw the mask removed. She also never identified the defendant in court.

Misharah Coleman indicated that sometime after the incident, she viewed her 1989 yearbook for Friendly High School at her home and recognized the Respondent as the man wearing the mask. She further testified that in her senior year she was involved in a work/study program and ordinarily attended school between the hours of 7:50 a.m. to 12:30 p.m. and then went to her job. According to Misharah Coleman, she had observed Simmons three to four times a week around the halls of the school, but she did not know him and did not recognize him until looking at the yearbook. She admitted during cross-examination that she had never been introduced to him or even participated in a conversation with anyone while he was present. Later, during the defense case, Rodney Smith, a friend of Simmons, and Clyde Simmons, the Respondent's father, revealed that in 1989 Derrick Simmons attended Gwenn Park High School in the morning hours and Friendly High School in the afternoon, the

opposite time that Misharah Coleman attended Friendly High School.

The State, out of the presence of the jury, attempted to call Marquette Coley, a codefendant who had previously pleaded guilty and had been sentenced. Coley refused to testify, notwithstanding that he had previously been held in contempt in a prior trial of the case at bar. The prior trial had been declared a mistrial because the jury was unable to reach a verdict.

The State, having received advance notice that Coley would refuse to testify, had advised the trial court, out of the presence of the jury, that it intended to offer Coley's written statement inculpating the defendant through the police officer who obtained it. The Respondent's objection that it was hearsay and that it violated the defendant's right to confront his accusers guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was overruled.

Detective Kenneth O'Berry testified over the renewed objection of counsel, and Coley's statement was admitted. According to Coley's written confession, he participated in a residential armed robbery because it was "easy" and in response to "peer pressure." He said he did not have a gun and did not know that anything was taken in the robbery. He implicated the Respondent, Derrick Simmons, only after the police indicated that they already knew about Simmons' involvement. Coley refused to provide any names the police did not already have. Pet.cert. 33a-36a.

The defense presented the testimony of Rodney Smith as part of an alibi defense, and Smith testified that Simmons was with him at the time the offense was committed waiting to get a flat tire fixed. Additionally, Earline Wright, Smith's mother, corroborated Smith's testimony that he called her. She further stated that she heard Derrick Simmons' voice in the background and saw a flat tire in Rodney's car the next day. Clyde Simmons, the Respondent's father, testified that he received a phone call at approximately 11:30 p.m. on the night in question when he learned his son had a flat tire.

Before the Maryland Court of Appeals, the Respondent argued, as at trial, both that the codefendant's written confession was inadmissible because it was not shown to be a declaration against penal interest and because the admission of the statements violated the state and federal Confrontation Clause. The Maryland court decided the Confrontation issue only. It said:

> [A]lthough the trial court and the state were of the view that Coley's statement was against his penal interest while Simmons believed that it was not, we need not decide whether it did or did not meet the stringent test set out in *Standifur* which must be established by the proponent to qualify a statement as a declaration against penal interest. *See State v. Standifur*, 310 Md. at 17, 526 A.2d 955 (1987).

Simmons v. State, 333 Md. 547, 561, 636 A.2d 463, 470 (1994); Pet.cert. 1a, 14a. The opinion went on to note that since the State conceded, and the court agreed, that the declaration against penal interest was not a firmly rooted

hearsay exception, that there were insufficient particularized guarantees of trustworthiness to justify the statement's admission under the Confrontation Clause. *Id.* Given Simmons' alibi defense and impeachment of the identification, the Court of Appeals agreed with the State's concession of harmful error and reversed the convictions. *Id.* at 564-65, 636 A.2d at 471-72; Pet.cert. 18a-19a.

REASONS FOR DENYING THE WRIT

THE MARYLAND COURT OF APPEALS PROPERLY RULED THAT THE ADMISSION OF A NON-TESTIFYING CODEFENDANT'S WRITTEN CONFESSION INCULPATING THE RESPONDENT WAS ERROR.

I. THIS CASE IS NOT WORTHY OF REVIEW SINCE THE PORTIONS OF THE NON-TESTIFYING CODEFENDANT'S WRITTEN CONFESSION TO POLICE THAT INCULPATE THE RESPONDENT ARE COLLATERAL AND NON-SELF-INCULPATORY AS TO THE DECLARANT AND WOULD NOT BE STATEMENTS AGAINST PENAL INTEREST UNDER MARYLAND LAW, IN LIGHT OF *WILLIAMSON V. UNITED STATES*.

In this case, the Petitioner would like this Court to hold that the Confrontation Clause allows the admission into evidence of a nontestifying codefendant's written confession to police which directly inculpated the Respondent. There is little doubt that the Maryland court would follow this Court's recent opinion in *Williamson v. United States*, No. 93-5256 (June 27, 1994), and hold the statement inadmissible as a matter of state evidentiary

law, given the history of the declaration against penal interest in Maryland. The Maryland cases recognizing the statement against penal interest exception to the hearsay rule follow the Federal Rules of Evidence, Rule 804(b)(3). *See e.g., State v. Standifur*, 310 Md. 10, 526 A.2d 955 (1987); Petition for a writ of certiorari, at 6, n.1 (Pet.cert.).

This Court's opinion in *Williamson* distinguished between self-inculpatory statements and non-self-inculpatory collateral statements. As the Court said:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement inculpates someone else.

Williamson, slip.op. at 6. The Maryland Court of Appeals agreed that Coley's confession was too unreliable to be admitted against Simmons for numerous reasons: the custodial nature of the interrogation; the non-spontaneous nature of the statement; the obvious reluctance of the declarant to speak; the declarant's bad character; the admission that he played only a minor role; the denial of knowing that the other robbers took anything; currying favor with the police by verifying Simmons' involvement; and not wanting to "snitch" on anyone. *Simmons v. State*, 333 Md. 547, 562-64, 636 A.2d 463, 470-71 (1994); Pet.cert. 15a-18a. Although this reasoning weighed against admissibility under a Confrontation Clause analysis, under Maryland evidence law as informed by *Williamson*, the

non-self-inculpatory confirmation of Simmons' identity by Coley, and perhaps even the self-inculpatory portion of the statement, given the extent to which Coley tried to minimize his own involvement, *see Williamson* (Ginsburg, J., concurring), would not qualify as a declaration against Coley's penal interest. The court's characterization of the *Standifur* test as "stringent" certainly implied the statement did not qualify as a declaration against penal interest. *Simmons*, 333 Md. at 561, 636 A.2d at 470; Pet.cert. 14a.

The Petitioner filed a petition for a writ of certiorari with this Court to take advantage of *Williamson*, hoping for a ruling that the prohibition of *Idaho v. Wright*, 497 U.S. 805 (1990), on the use of corroborating evidence to establish particularized guarantees of trustworthiness under *Ohio v. Roberts*, 448 U.S. 56 (1980), would be overruled or limited. The Confrontation Clause analysis comes after a ruling that evidence is admissible under an exception to the hearsay rule. *Id.* at 66. The Court of Appeals never ruled that the State had proven the statement admissible under any specific exception to the rule against hearsay, although the State conceded below that the statement against penal interest exception was the only applicable exception.

Since in light of *Williamson*, Coley's written confession would never be admitted under state evidentiary law, this Court's acceptance of the case would not have significance for the parties. Instead, even a change by this Court of the Confrontation Clause analysis to be used in determining the admissibility of a nontestifying codefendant's non-self-inculpatory accusation of another, after a review by the Court of Appeals of the state law issue

remaining, would eventually yield the same result, a new trial for Simmons.

Moreover, any holding by this Court with respect to the Confrontation Clause would of necessity be advisory and in the nature of a hypothetical opinion. That is because in this case there is no hearsay exception under which Coley's confession fits. If the Court wants to revisit over twenty-five years of Confrontation Clause jurisprudence holding that such uncross-examined codefendant's statements are inherently unreliable, *e.g. Douglas v. Alabama*, 380 U.S. 415 (1965); *Bruton v. United States*, 391 U.S. 123 (1968); *Lee v. Illinois*, 476 U.S. 530 (1986); *Cruz v. New York*, 481 U.S. 186 (1987), it would be appropriate first for some legislature or other rule making body to provide for their admission under the applicable rules of evidence, and then for some court to actually hold that the new hearsay exception permits the admission of the evidence. As this Court noted in *Wright*, the Confrontation Clause acts in criminal cases to limit the admission of some hearsay evidence which would otherwise be admissible under an exception to the rule against hearsay. 497 U.S. at 814.

The Maryland Court of Appeals apparently felt it unnecessary to decide the evidentiary issue because it felt the resolution of the confrontation issue was obvious. For all intents and purposes, *Williamson* resolved the issue the Maryland court passed over, favorably to the Respondent. For this reason the Court should deny the petition for a writ of certiorari.

II. THIS CASE IS NOT WORTHY OF REVIEW BECAUSE *IDAHO V. WRIGHT* WAS PROPERLY DECIDED AND BECAUSE THE CORROBORATING EVIDENCE IN THIS CASE IS NOT TRULY INDEPENDENT OF THE CODEFENDANT'S STATEMENT.

A. *Idaho v. Wright* was properly decided and applies to codefendant confessions.

This Court has consistently and repeatedly recognized the presumptive unreliability of a codefendant's uncross-examined confession to police which inculpates a defendant. *Douglas v. Alabama*, 380 U.S. 415 (1965); *Bruton v. United States*, 391 U.S. 123 (1968); *Lee v. Illinois*, 476 U.S. 530 (1986); *Cruz v. New York*, 481 U.S. 186 (1987). This Court said:

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame to others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Bruton v. United States, 391 U.S. 123, 136 (1968) (footnote omitted). Even the dissenting opinion by Justice White in *Bruton* agreed that "[a]s to the defendant, the confession of the codefendant is wholly inadmissible," that "the statements of a codefendant have traditionally been viewed with special suspicion," and that as codefendant's

confessions are less reliable than ordinary hearsay as to the defendant. 391 U.S. at 141-42 (White, J., dissenting) (citations omitted).

In *Lee*, the Court said:

> We reject Respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.

Lee, 476 U.S. at 544, n. 5.

The Court also stated:

> The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread the blame, curry favor, avenge himself, or divert attention to another.

Id., 476 U.S. at 545.

In the case of *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court formulated a test for determining whether the admission of hearsay evidence violates the Confrontation Clause.

The Court's opinion stated:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is

> unavailable. Even then, his statement is admissible only if it bears adequate "indicia of unreliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66. The *Roberts* test retains its authority as the "general approach" for determining whether the admission of hearsay violates the Confrontation Clause. *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

In *Wright*, this Court decided that the admission of unsworn statements of a three year old child to a doctor under Idaho's residual hearsay exception violated the Confrontation Clause. When the proffered statement falls under a hearsay exception that is not firmly rooted, the Court indicated the inquiry to determine the existence of particularized guarantees of trustworthiness is independent of any other evidence admitted at trial and is limited to "the circumstances that surround the making of the statement and render the declarant particularly worthy of belief," sufficient to rebut the presumptive unreliability of such statements. *Id.* at 819. The Court said:

> the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

Id. at 823. In indicating its rejection of a rule allowing corroboration of a proffered statement with other independent evidence in the case, the Court suggested that corroboration with other evidence, such as in the case of interlocking confessions, is more appropriately considered in connection with harmless error analysis. *Id.* at 823-24. In light of the "suggestive manner" in which the doctor had conducted the interviews of the children and other circumstances in *Wright*, *id.* at 826, the Court held that the State had failed to meet its burden of proving the statements possessed "particularized guarantees of trustworthiness."

The State below conceded, and the Maryland Court of Appeals agreed, that the declaration against penal interest is not a "firmly rooted" exception to the hearsay rule. *Simmons*, 333 Md. at 561, 636 A.2d at 470; Pet.cert. 14a. Therefore, Coley's statement is only admissible if the Petitioner can demonstrate particularized guarantees of trustworthiness that assure the reliability of the statement. *Roberts*; *Wright*.

As *Idaho v. Wright* makes clear, the determination of whether a statement bears sufficient particularized guarantees of trustworthiness requires a consideration of all of the circumstances under which the statement was made. The Maryland court had little difficulty concluding under *Wright* that Coley's statement was not reliable. *See Simmons*, 333 Md. at 561, 636 A.2d at 470; Pet.cert. 14a. The State objects to *Wright*'s prohibition on consideration of corroborating evidence and, hence, the Maryland court's failure to consider Misharah Coleman's questionable identification of Simmons in deciding whether

Coley's statement contains particularized guarantees of trustworthiness.

The *Wright* Court properly ruled that a court should not consider corroborating evidence to determine the admissibility of presumptively unreliable hearsay. Since the corroborating evidence should be independent of the hearsay statement, it is not relevant to the Confrontation Clause inquiry. The Confrontation Clause inquiry focuses on the statement's reliability in the absence of cross-examination. The focus is therefore on areas upon which the declarant could be questioned. Corroborating evidence would normally be beyond proper cross-examination of the declarant.

For example, in this case, the codefendant Coley could not answer any questions about the reliability of the identification. The presence or absence of the identification does not add to or detract from the reliability of Coley's statement for purposes of admissibility under the Confrontation Clause. Even if every eyewitness denied Simmons participated in the robbery, it would not affect the admissibility of a hearsay statement which was sufficiently reliable under *Roberts*. Of course, once admitted, the jury may consider the statement together with the corroborating evidence or lack thereof to determine the ultimate issue of guilt.

The State gave a number of reasons below why *Idaho v. Wright*'s prohibition on the use of corroborating evidence should be overruled. They are that *Wright*'s applicability to codefendant confessions was "dicta by a bare majority," over a strong dissent, and inconsistent with

two codefendant confession cases, *Lee v. Illinois*, 476 U.S. 530 (1986) and *Cruz v. New York*, 481 U.S. 186 (1987). *Simmons*, 333 Md. at 561-62, 636 A.2d at 470; Pet.cert. 15a. Although *Wright* was a child abuse case, and specifically addressed a residual hearsay exception, *Wright* did not purport to distinguish among different types of non-firmly rooted hearsay exceptions in its setting forth its clarification of the *Roberts* test. The *Wright* Court has already rejected the argument that *Lee* and *Cruz* had allowed the use of corroborating evidence to establish particularized guarantees of trustworthiness. *Wright*, 497 U.S. at 823, n.*, 824. Both the majority and dissent in *Wright* at least appeared to agree that the same test should apply to different classes of non-firmly rooted hearsay exceptions. The *Wright* majority's as well as the dissent's references to *Lee* and *Cruz* strongly implied that the same rule should apply to codefendant statements.

Moreover, to set different tests for trial courts to determine the existence of particularized guarantees of trustworthiness could make application of these rules unnecessarily confusing. Given this Court's consistent rejection of uncross-examined codefendant confessions, they stand alone, as probably the most unreliable of all classes of hearsay. There is therefore no reason to establish a test under the Confrontation Clause that would make it easier to admit codefendant confessions than other kinds of hearsay under other non-firmly rooted exceptions to the rule against hearsay.

To the contrary, given the tenuous history of uncross-examined custodial codefendant confessions, this Court should reaffirm that statements, like Coley's, containing actual evidence that the declarant minimized his own

culpability, are *per se* inadmissible. Concededly, both *Lee* and *Cruz* contained *dicta* suggesting that interlocking confessions are relevant to reliability. *Lee*, 476 U.S. at 545 ("[i]f these portions of the codefendant's purportedly interlocking statement which bear to any significant degree are not thoroughly substantiated by the defendant's own confession . . . "); *Cruz*, 481 U.S. at 192 ("what the 'interlocking' nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability* . . . "). The same language in *Lee* has been cited to support the proposition that such confessions are not *per se* inadmissible. *See New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring) (quoting *Lee* and arguing that *Roberts* "did establish that a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause"). In *Wright*, this Court emphatically rejected the language in *Lee* and *Cruz*. *See Wright*, 497 U.S. at 823, n.* (stating that language in *Cruz* suggesting that interlocking confessions may be used to establish the reliability of a codefendant's confession had been "taken out of context"), at 824 (clarifying *Lee*). There is therefore no reason not to strictly adhere to:

> the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.

Lee, 476 U.S. at 546.

For all of these reasons, the Maryland Court of Appeals was correct to reject the Petitioner's attack on

Wright. *Simmons*, 333 Md. 547, 561-62, 636 A.2d 463, 470; Pet.cert. 14a-15a.

B. If *Idaho v. Wright* is to be revisited, the corroborating evidence, unlike in this case, should be truly independent of the codefendant's statement; here, instead, the police gave the codefendant the Respondent's name first.

The Petitioner is seeking to have this Court reconsider its prohibition in *Idaho v. Wright*, 497 U.S. 805 (1990), on the use of corroborating evidence to establish particularized guarantees of trustworthiness under the Confrontation Clause. In this case, however, the corroborating evidence, i.e. the identification of Simmons by a State's witness, is not truly independent of the codefendant's statement. The police developed the Respondent as a suspect in this case as a result of an identification by one of the victims, Misharah Coleman. Evidence was adduced by the Respondent at trial that undermined the reliability of the identification: the difference in times the witness and Respondent attended school; the other witness' testimony that she did not see the masked man remove the mask; and the Respondent's alibi. As a result of the questionable identification, when the police interrogated Marquette Coley, the police told Coley that they already knew Simmons was involved. All Coley did was to confirm Simmons' identity for police, saying, "I don't want to snitch on someone you already know the other guys and I don't want to snitch on anyone." Pet.cert. 35a. Coley refused to give the police any new names.

The Petitioner wants this Court to hold that the questionable identification, that led to the police question, that resulted in Coley's answer, should be allowed to bolster the reliability of the answer. The Petitioner further wants this Court to hold that consideration of the questionable identification would tip the scale in favor of the State, to overcome the presumed unreliability of the statement. Coley's written accusation against Simmons is nothing more than the questionable identification in disguise, uttered back to police by Coley while he was obviously under pressure to give some kind of statement. By creating a fiction that the identification is independent of Coley's statement, the Petitioner would have this Court give the identification twice the weight it deserves in deciding the reliability of Coley's statement.

This case would arguably be far different if the codefendant, without any prompting on the part of police, had spontaneously provided the name of the defendant, who the police had already been investigating, and the source of the police information was totally independent of the codefendant. Since Coley did not give the police Simmons' name first, even assuming that corroborating evidence were relevant to the statement's reliability, the identification cannot possibly bolster the reliability of this statement.

When the identification is considered along with the many reasons given by the Court of Appeals for rejecting the statement, the statement is still just as unreliable: it was made while Coley was in custody accused of committing a serious crime; it expressly minimizes Coley's conduct; it was non-spontaneous; it was obviously made reluctantly; he claimed he committed the robbery because

it was easy; he denied knowing that anything was taken; he curried favor with the police by verifying Simmons' involvement; and he refused to "snitch" on anyone. *Simmons*, 333 Md. at 562-64, 636 A.2d at 470-71; Pet.cert. 15a-18a.[2]

This statement contains actual evidence of many of the circumstances that have presumptively made codefendants' confessions inculpating another the most suspect of all classes of hearsay. Of all the codefendant confessions considered by this Court, for the reasons given above, Coley's confession in this case must be among the least reliable. Even with corroborating evidence considered, the statement would not possess particularized guarantees of trustworthiness. If the Confrontation Clause permits admission of Coley's statement against Simmons in this case, it is hard to imagine an uncross-examined codefendant's confession that would not be admissible.

Because the corroborating evidence here is not truly independent of the codefendant's statement, if this Court is inclined to revisit *Wright*, this is a poor case to do so.

CONCLUSION

Since the Maryland Court of Appeals would follow the opinion in *Williamson v. United States*, excluding the

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[2] Additionally, since the codefendant is unavailable, the defendant is effectively precluded from introducing evidence to controvert the officer's testimony with respect to voluntariness and *Miranda v. Arizona*, 384 U.S. 436 (1966).

codefendant's statement inculpating the Respondent on evidentiary grounds, and since the corroborating evidence the Petitioner would have the Court weigh to determine the statement's reliability is not truly independent of the statement, this case is not in a proper posture for the Court to address the issue posed by the Petitioner, i.e. whether this Court should overrule or limit *Idaho v. Wright*'s prohibition on the use of corroborating evidence to determine the reliability of a statement admitted under a non-firmly rooted exception to the rule against hearsay. Additionally, codefendant confessions are inherently unreliable as to the defendant. The Maryland Court of Appeals properly ruled that the admission of a non-testifying codefendant's written confession inculpating the Respondent was error. For those reasons, the Respondent requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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